United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: October 25, 2004

TO : Ronald K. Hooks, Regional Director
Region 26

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Arkansas Aluminum Alloys, Inc. 530-6033-7000
Case 26-CA-21596 530-6033-7028
530-6033-7084
530-6067-2025
530-6067-4033-9500

The Region submitted this case for advice as to whether the Employer violated Sections 8(a)(1) and (5) when, during bargaining with the Union for an initial collective bargaining agreement, the Employer bargained separately over health insurance coverage and unilaterally implemented its health insurance proposal before reaching a bona fide impasse.

We conclude that a complaint should issue, absent settlement, alleging that the Employer violated Sections 8(a)(1) and (5), because, although the Employer was privileged, under the narrow exception articulated in Stone Container[1] and Brannan Sand and Gravel,[2] to bargain separately over health insurance coverage, the parties were not at impasse when the Employer unilaterally implemented its health insurance proposal.[3]

FACTS

Arkansas Aluminum Alloys, Inc. (Employer) manufactures aluminum ingots and has a workforce of about 130 production and maintenance employees.[4] From 1986 to April 23, 2003[5],

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[1] 313 NLRB 336 (1993).

[2] 314 NLRB 282 (1994).

[3] [*FOIA Exemption 5*

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[4] At the time of the events that are the subject of the instant charge, the evidence demonstrates that the Employer had a workforce of 111 employees.

the United Brotherhood of Carpenters and Joiners of America, Southern Council of Industrial Workers (SCIW) represented the Employer's employees and the SCIW Trust Fund provided the employees' health insurance coverage. On February 24, UAWA (Union), which later affiliated with the United Steelworkers of America as its Local Union 9494, filed a representation petition seeking to unseat SCIW pursuant to a secret ballot election. On April 23, prior to the election, SCIW disclaimed any further interest in the representation of the Employer's employees. On April 29, SCIW advised the Employer that effective April 30, it was terminating health insurance benefits provided through its trust fund for the Employer's employees since there was no longer a contract in effect between the parties. On May 23, the Union was certified as the exclusive bargaining representative of the Employer's employees.

After SCIW terminated its insurance coverage and the Union was certified, the Employer arranged to provide substitute benefits for the employees under a self-insured fund established by its sister company, A. Tenenbaum Company of Little Rock. The new health insurance plan went into effect on June 1, and mirrored the SCIW plan in terms of employee costs and benefits. The financing mechanism differed, however. Under the SCIW plan, the Employer and the employees each paid set premiums to the union trust fund for the coverage provided. Under the new, self-insured plan, the Employer, using its own funds and the employees' "premium" contribution, paid the first $40,000 in benefits for each employee and purchased a reinsurance plan to cover additional benefits claims up to a total of $1.2 million. The Employer alone absorbed any additional benefit costs above the $1.2 million. Between July 1 and December 31, the Employer incurred $185,000 in benefits costs over and above the cost of its contribution to cover the first $40,000 in benefits per employee and the reinsurance plan. The contract period for the plan and the reinsurance plan ran from February 2 to January 31, 2004 and both had a renewal date of February 1, 2004.

The parties began negotiations for an initial collective bargaining agreement in August. From December 9, when the Employer first announced the health insurance issue to February 9, 2004, when the Employer declared impasse, the parties discussed the health insurance issue at eight bargaining sessions. During some of the sessions, health insurance was only one aspect of the parties' negotiations for an overall agreement.

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[5] All dates herein are in 2003, unless otherwise indicated.

On December 9, the parties met and the Employer advised the Union for the first time that the renewal date for the current insurance plan was February 1, 2004[6], and that according to actuarial estimates, premiums were expected to increase by 78%. In anticipation of the significant increase, the Employer was seeking an insurance quote from Arkansas' Blue Cross Blue Shield and requested the Union obtain an insurance quote from its Union trust fund.

On January 12, the parties met again and discussed the health insurance issue. The Union informed the Employer it was unable to get a quote from its Union trust fund because the insurance information it had was outdated and requested the Employer provide it with current health insurance information, including a summary plan description, census, and major claims experience.

On January 13, the Employer provided the Union with the current insurance information it had requested and emphasized that the "insurance issue was getting to a critical point." The Union agreed the insurance issue was important; however, it stated other issues were also important and expressed it wanted to have a collective bargaining agreement in place by February 15.

On January 26, the Union provided the Employer with the insurance quote from its Union trust fund and the Employer separately reviewed the quote. Upon returning to the meeting, the Employer rejected the Union's proposal and presented other proposals. All of the Employer's proposals required the employees to pay the full premium increase, which the Employer stated was the practice under its previous contracts with SCIW.[7] The Union disagreed that the Employer's past practice with SCIW dictated the employees should pay the full premium increase. The Employer stated that it lost $2 million in the last fiscal year and was on track to do the same this fiscal year. The Union asked if the Employer was pleading poverty as the economic part of its negotiations began because, if so, it needed to look at the Employer's books. The Employer said that the Union

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[6] Dates hereinafter occurred in 2004 unless noted otherwise.

[7] The prior contracts between SCIW and the Employer state, "The Company shall not be liable for any increase in insurance premiums . . .for the life of this Agreement." Pursuant to this provision, the Employer had routinely passed along to employees all increases in premiums during the life of the contract. There is no evidence as to how, if at all, the parties adjusted the allocation of the premiums from one contract to the next.

could look at its books but that an agreement needed to be reached on the health insurance issue before February 1. The Union stated that it needed to look at the economic package as a whole. The parties agreed that they needed to devise a proposal they could both afford and ended the negotiations for the day.

On January 28, the parties met again to discuss the health insurance issue. The Union suggested substituting a higher deductible to reduce premiums. The Employer proposed that it would provide single coverage under the Union trust plan and the employees would pay the full amount for any dependent coverage; it also proposed making participation in insurance voluntary rather than mandatory. The Employer stated that if the parties did not reach a resolution, it would implement the premium increase on February 1 to cover increased costs on the existing coverage,[8] and the employees would have the amounts deducted from their paychecks in the second week of February. Both parties agreed that this was not a good option and the Union stated it would make additional proposals at the next meeting scheduled for January 30.

On January 30, the parties met and discussed a higher deductible insurance plan. The Employer proposed to adopt the Union's trust fund plan on March 1 and to split the premiums on a proportional basis and to remain on the current plan until then. The Union rejected this proposal and continued to request the Employer pay more of the premiums but the Employer restated that its $2 million loss last year and its projected loss this year would not allow it to contribute any more toward the premium costs. The Union again asked the Employer if it was pleading poverty and the Employer said it was. The Union again requested to see the Employer's books and the Employer responded that the Union's auditor should contact the Employer's personnel manager or attorney.

The Union again stated its concern over discussing the health insurance issue separately from the rest of the economic portion of the contract and asked the Employer to delay the increased payment for a couple of weeks so they could discuss other economic issues. The Employer responded

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[8] Apparently, the Employer proposed to adjust the financial structure of its self-insured plan to continue the existing coverage. It increased the amount it would pay before the reinsurance would be triggered (previously $40,000) and it increased the amount of its reinsurance plan. The former step lowered the premium needed; the latter increased it but lessened the risk that the Employer would have to pay excess amounts not covered by reinsurance.

that the increased premium payments had to be made to the current insurance trust and that if the monies were not deducted from the employees' paychecks, the Employer would be responsible. Further, the Employer said it was still attempting to obtain an insurance quote from Arkansas' Blue Cross Blue Shield but needed all the employees to return their health questionnaires. The Union said it would get the questionnaires completed and returned to the Employer.

After this meeting, the Union's chief spokesperson contacted the International headquarters in Pittsburgh, Pennsylvania, to request the assignment of a research specialist to review the Employer's books and to compile an information request. About a week later, the International assigned Steve Newman to the project. After Newman's assignment, the Union's chief spokesperson and Newman spoke to discuss the health insurance issue and the Employer's claimed inability to contribute more toward the premium. Newman stated he was going to speak with the Employer's attorney to request information.

On February 4, the Employer said it was still unable to get a quote from Arkansas' Blue Cross Blue Shield because it still had not received all of the health questionnaires from the employees. The Employer again suggested remaining on the existing plan then switching to the Union's trust fund plan because its costs, although still unaffordable, were lower. The Employer also gave the Union a copy of a proposal from a different actuary who offered to provide family coverage and single coverage, with lower premiums for employees who had been with the Employer for over two years. The Employer provided the Union with figures for the same plan with a $1,500 and a $2,500 deductible based on four groups of coverage: single, single/spouse, single/children, and family. At this point, the Employer said the parties needed to find a solution or the premium increase would be passed on to the employees pursuant to its "last" offer.[9] The Union took exception to the Employer's statement and said that they had an entire contract to negotiate and the Employer could not just take pieces of the contract and implement changes because the parties were not at impasse. The Employer responded that it believed it was permitted to implement the increase and pass on 100% of the premium increase because it had done so in the past. The Union asked whether, if it agreed to a plan based on a $1,500 deductible, the Employer would then pay more of the premium increase; the Employer declined. After a caucus, the Union asked if the Employer's new proposal was based on the new

[9] The evidence is unclear as to which proposal the Employer was referring to as its "last" offer at this point in the negotiations.

actuarial report. The Employer responded it was. The Union stated it did not like "piecemealing" the contract but would do so in this case because of the Employer's situation. The Union then made a counterproposal, contingent upon membership approval. The counterproposal was to implement a $1,500 deductible plan prior to reaching an overall agreement on the contract, if the premiums were paid on a percentage basis, with the Employer and employees sharing the increased costs in the same proportion as they shared the costs under the Employer's self-insured plan in 2003. The Union also requested a copy of both actuarial reports on which the Employer's proposals were based. The Employer said it would consider the Union's proposal and the meeting ended.

On February 9, the parties had their last bargaining session on the insurance issue. At this meeting, the Employer rejected the Union's February 4 counterproposal and reiterated its inability to pay increased premium contributions. The Employer gave the Union the actuarial data for the existing $500 and proposed $1,500 deductible plans. The Employer then gave the Union a new proposal on insurance. The proposal was for a $1,500 deductible plan, however, the Employer had rearranged the premium amounts for each of the four groups of coverage. The Employer explained that under this proposal, everyone paid the same percentage premium increase of 60.06%. The new proposal differed from the February 4 proposal in that the Employer's allocation of premium amounts increased significantly for an employee electing family coverage, while the premiums decreased significantly for employees selecting single coverage. For example, under the February 4 proposal, an employee with less than two years seniority selecting family coverage would pay a weekly premium contribution of $59.04, while under the new proposal the employee would pay $77.53 - an increase of $18.49 or 31%. Similarly, under the February 4 proposal, an employee with more than two years of seniority selecting single coverage would pay a weekly premium contribution of $27.90, while under the new proposal the employee would pay $14.06 - a decrease of $14.84 or 49%.

After a break, the Union stated it was difficult for it to move forward until it saw the Employer's books. The Employer said it had not heard from the Union and the Union responded that someone would contact the Employer that week. The Employer said it was under a deadline of that day to do something on the insurance issue and that it had two options: (1) to implement the deductions from the employees' paychecks for the entire premium increase or (2) to implement the Employer's $1,500 deductible plan. The Union stated they needed to be under a deadline for the entire contract. The Employer responded that its $1,500 deductible plan would be implemented immediately. The Union objected stating that the parties were not at impasse. The Employer stated it assumed that the Union did not have a counterproposal. The Union replied it would once they saw the books and said that someone would be assigned that week to look at the books. The Employer said that was not soon enough, that it was implementing the $1,500 deductible plan immediately and declared impasse on the health insurance issue. The Union again objected. The parties continued to discuss other matters and agreed to meet again on February 20.

On February 11, the Union's analyst faxed a letter to the Employer's counsel requesting: (1) balance sheets; (2) income statements for the past 5 years; (3) reports confirming revenue data; (4) operating and financial information; and (5) the forecast for 2004 budget. On February 13, in response to the Union's February 11 information request, the Employer provided the Union with: (1) the fiscal year 2003 profit and loss statement; and (2) the YTD fiscal year 2004 profit and loss statement. The Employer concedes that it did not provide all the information the Union requested. The Union, however, did not reiterate its request for further information.

On February 16, the Employer posted a notice to employees that stated that effective February 1, the employees' healthcare contributions would increase in accordance with the Employer's proposal on February 9. The notice specified that there would be an open enrollment period ending February 29, for employees to make changes to their coverage. On March 19, a representative of the Employer's sister company, A. Tenenbaum, signed and forwarded to the insurer the plan placing the Employer's employees under the same reinsurance plan as its employees and specified that the plan was effective as of February 1.

On February 25, the Union's analyst provided the Union with a recommendation based on the data the Employer provided on February 13. The analyst suggested that the employees pay a larger share of the insurance costs while the Employer was losing money and that the parties negotiate a formula that would automatically increase the Employer's portion of insurance costs when it became profitable.

ACTION

We conclude that complaint should issue, absent settlement, alleging that the Employer violated Sections 8(a)(1) and (5), because although it was privileged to engage in separate bargaining over the health insurance issue during the parties' negotiations for an initial contract, it was precluded from unilaterally implementing its final healthcare proposal absent reaching an impasse on that issue.

Generally, where parties are engaged in negotiations for a new overall agreement, an employer may not bargain separately about specific terms and conditions and then unilaterally implement its proposal regarding those matters unless and until the parties have reached an overall impasse on bargaining for the agreement as a whole.[10] Two exceptions to the general rule against such "piecemeal" bargaining are: (1) when a union delays bargaining;[11] and (2) when economic exigencies compel prompt action.[12] We agree with the Region that the instant case is not governed by the these exceptions because the facts do not indicate that the Union delayed bargaining or that the increase in premiums would have irrevocably impacted the Employer's business.

Under the exception articulated in Stone Container[13] and Brannan Sand & Gravel,[14] the Board has recognized another narrow exception to the general prohibition against piecemeal bargaining. An employer may implement a change in response to or in anticipation of a discrete event that cannot wait for an overall impasse in negotiations, such as the discontinuance of a health insurance plan or an annual wage review, when that change "simply happens to occur while contract negotiations are in progress."[15] Under these circumstances, an employer may seek bargaining over the discrete issue and implement its proposed changes without reaching impasse on an overall agreement as long as it

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[10] Pleasantview Nursing Home, 335 NLRB 961, 962 (2001), enfd. in rel. part 351 F.2d 747 (6th Cir. 2003); Bottom Line Enterprises, 302 NLRB 373 (1991), enfd. sub nom. Master Window Cleaning, Inc. v NLRB, 15 F.3d 1087 (9th Cir. 1994).

[11] Bottom Line, 302 NLRB at 374.

[12] RBE Electronics of S.D., Inc., 320 NLRB 80, 81 (1995); see also Maple Grove Health Care Center, 330 NLRB 775, 778 (2000) (increased health insurance premiums did not constitute "compelling economic circumstances" sufficient to justify unilateral action).

[13] 313 NLRB 336 (1993).

[14] 314 NLRB 282 (1994).

[15] Stone Container Corp., 313 NLRB at 336.

provides the union with adequate notice and an opportunity to bargain to impasse on that issue.

In Stone Container Corp.,[16] the Board held that the employer lawfully implemented its position regarding an annual wage increase, subsequent to good-faith negotiations with the union that were apart from bargaining for an overall agreement. The employer had a practice of considering annual wage increases for unit employees each April for five consecutive years. In April of the succeeding year, while negotiating a collective-bargaining agreement, the employer again considered the grant of a wage increase, but declined to do so for economic reasons. Although the employer made its proposal to the union in time for bargaining, the union made no counterproposal and did not raise the issue again during negotiations. The Board concluded that the employer satisfied its bargaining obligation and thus was privileged to maintain the status quo by considering, and this time rejecting, a wage increase that "simply happens to occur" during negotiations for an initial agreement.[17]

Relying upon Stone Container, in Brannan Sand & Gravel Co.,[18] the Board held that the employer could lawfully implement its proposed annual changes to its health insurance program after good-faith negotiations. The employer had reviewed and adjusted the program's costs and benefits on an annual basis since the program's inception. The Board concluded that the annual health plan changes were similar to the annual wage increases in Stone Container, i.e., a discrete event that just happened to occur while contract negotiations were in progress. Nonetheless, the Board adopted the ALJ's conclusion that the employer unlawfully implemented its proposal because it merely presented the health plan changes to the union as a fait accompli, without providing notice and an opportunity to bargain.

With regard to impasse, the Board will find a genuine impasse in negotiations exists only when there is "no realistic possibility that continuation of discussion at that time would have been fruitful."[19] Whether a bargaining

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[16] Id.

[17] Id.

[18] 314 NLRB 282 (1994).

[19] Cotter & Co., 331 NLRB 787 (2000) review granted in rel. part 254 F.2d 1105 (D.C. Cir. 2001); Larsdale, Inc., 310 NLRB 1317, 1318 (1993), citing PRC Recording Co., 280 NLRB 615, 635 (1986), enfd. 836 F.2d 289 (7th Cir. 1987).

impasse exists is a matter of judgment. The Board considers, among other things, bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue(s) as to which there is disagreement, and the contemporaneous understanding of the parties as to the state of negotiations when deciding whether an impasse in bargaining existed.[20] The Board also considers whether parties demonstrated flexibility and willingness to compromise in an effort to reach agreement.[21] Furthermore, impasse may not exist where there is a change of bargaining position or continuous or further bargaining.[22] In short, the Board requires that *both* parties must believe that they are at the end of their rope.[23]

Here, we agree with the Region that the discrete event, i.e. the renewal of the health insurance plan on February 1, "simply happened to occur"[24] during contract negotiations. The evidence demonstrates that the contract period for the plan runs from February 2 to January 31 annually and the renewal date for the plan is February 1. To ensure the continuance of healthcare coverage for its employees, the Employer was privileged to bargain separately over the health insurance issue due to the imminent renewal date on February 1. However, under the exception set forth in Stone Container and Brannan Sand & Gravel, the Employer was prohibited from unilaterally implementing a discrete proposal during contract negotiations unless the parties were at impasse over the issue.

We conclude that the parties were not at impasse on February 9 when the Employer broke off bargaining and implemented its healthcare proposal because: (1) the Employer introduced a new proposal that differed from its

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[20] Taft Broadcasting Co., 163 NLRB 475, 478 (1967), enfd. sub nom. AFTRA v. NLRB, 395 F.2d 622 (D.C. Cir. 1968).

[21] Cotter & Co., 331 NLRB at 787.

[22] PRC Recording Co., 280 NLRB at 635-36, and cases cited therein.

[23] Grinnell Fire Protection Systems Co., 328 NLRB 585 (1999) enfd. 236 F.3d 187 (4th Cir. 2000), cert. denied 534 U.S. 818 (2001), and cases cited therein; Larsdale, Inc., 310 NLRB at 1318.

[24] Brannan Sand & Gravel, 314 NLRB at 282; Stone Container, 313 NLRB at 336. See also, Alltel Kentucky, Inc., 326 NLRB 1350, 1350 fn. 4 (1998).

previous proposals on the same day it declared impasse; (2) movement was evident when the Employer broke off bargaining and declared impasse; and (3) the Union's request to review financial information was still outstanding at the time the Employer broke off bargaining and implemented its new proposal.

At the February 9 bargaining session, the Employer introduced a new proposal wherein it allocated premium increases markedly differently than its previous proposal on February 4. The new proposal increased the premium contributions significantly for an employee selecting family, employee/spouse, and employee/child coverage, while decreasing the premium contributions significantly for an employee selecting single coverage. For example, the impact of the reallocation of premium contributions under the new plan required a low-seniority employee electing family coverage to pay 31% more than it would have under the prior proposal. In comparison, a high-seniority employee electing single coverage would pay 49% less than it would have under the prior proposal. As a result, the February 9 proposal shifted the burden of the premium contribution to employees electing family coverage from those electing single coverage. This reallocation of burden was a significant change from the Employer's February 4 proposal, and warranted thoughtful consideration by the Union. Therefore, it cannot be said that the parties reached a bona fide impasse on the insurance issue when the Employer introduced a new proposal that departed from its previous proposal on the same day it declared impasse and announced immediate implementation of its new proposal.

Further, movement by both parties was evident throughout negotiations and, most importantly, at the time the Employer broke off bargaining, which belies a finding of impasse. The parties discussed the substantial and unprecedented 78% increase in insurance premiums at eight bargaining sessions in the short time between December 9, when the Employer first announced the issue and February 9, when the Employer broke off bargaining and declared impasse. The first concrete proposal was apparently not made until the fourth of those meetings on January 26. During the sessions, the parties each made various proposals and often kept different proposals on the table at the same time. The proposals were shaped by newly acquired information, such as quotes from different insurance providers and different actuarial reports. In fact, at the bargaining session prior to the February 9 session, the parties were still discussing various proposals offered by both parties, including remaining on the existing plan before switching to the Union's trust fund plan, a $1,500 deductible plan, and a $2,500 deductible plan. On February 9, the Employer introduced a new proposal that was different from its prior proposals, which itself evidenced movement on the Employer's part. Had the Employer not halted discussions on the issue by breaking off bargaining and declaring impasse on the same day it introduced its new proposal, the Union would have had an opportunity to properly evaluate the new proposal and to discuss potential counteroffers. In light of this bargaining history, it is apparent that neither party was at "the end of its rope" on the date the Employer prematurely declared impasse.[25]

Finally, the Board has held that failure to supply information relevant and necessary to bargaining constitutes a failure to bargain in good faith in violation of Section 8(a)(5), which precludes impasse.[26] On February 9, when the Employer declared impasse and stated it was implementing its proposal immediately, there was still an outstanding information request from the Union. Specifically, on February 9, the Union requested to review the Employer's books in order to substantiate the Employer's claimed inability to pay and to devise a counterproposal. On February 11, the Union sent the Employer a letter requesting certain financial information. After receiving only some of the information it requested from the Employer, the Union, in fact, did devise a feasible counterproposal, wherein it took into account the Employer's position that it would reject any proposal that required it to contribute any additional amounts toward the premium.

Although the Union had previously requested to review the Employer’s books but did not contact the Employer's accountant until February 11, the evidence does not indicate that the Union's requests were dilatory or intended to delay negotiations.[27] After the January 30 meeting, the Union's chief spokesperson contacted the Union's international

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[25] See generally PRC Recording Co., 280 NLRB at 635-36 (no impasse where there are changes in bargaining position and continuous bargaining up until break off of negotiations).

[26] Pertec Computer Corp., 284 NLRB 810, 812 (1987), supplanted by 298 NLRB 609 (1990), enfd. as mod. 926 F.2d 181 (2d Cir. 1991) (the employer's refusal to provide cost information to the union prevented a full exploration of the subjects on which the union would have had to concede in order to present useful alternatives); Harvstone Mfg. Corp., 272 NLRB 939, 944 (1984), enfd. denied on other grounds, 785 F.2d 570 (7th Cir. 1986), cert. denied 479 U.S. 821 (1986).

[27] The Union requested to see the Employer's books on January 26 and again on January 30 after the Employer pled poverty on both occasions.

headquarters to request that a research specialist be assigned to the project. The Union determined it needed a specialist who would know what information to request from the Employer and how to interpret and analyze such information. That it took over a week to obtain a specialist is reasonable in light of the circumstances and does not support that the Union was attempting to delay negotiations.

Also, while agreement on the health insurance issue may have been important in light of the February 1 expiration date, there was nothing remarkable about the February 9 date that justified the Employer's actions of breaking off bargaining, declaring impasse and immediately implementing its new proposal on such date. This is evident because even after implementing its healthcare proposal, the employees were allowed to make changes to their coverage until February 29 – the end of the open enrollment period. Thus, there was more time to discuss the health insurance issue with the Union. Further, it was not until March 19 that the Employer forwarded to the insurer the plan placing its employees under the same reinsurance plan. In short, that the Employer took these actions after the February 1 deadline tends to undercut its position that immediate action on February 9, which resulted in the termination of discussions on the health insurance issue, was necessary.

We also agree with the Region that this case is distinguishable from <u>Post-Tribune Company</u>,[28] where the employer was privileged to pass along increased healthcare premiums to employees without even having to bargain with the union absent impasse, because the proposed change simply effectuated the status quo ante. Under <u>Post-Tribune Company</u>, "an established past practice can become part of the status quo."[29] Here, the Employer argues that its implementation was consistent with its past practice of passing on any healthcare premium increase to its employees

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[28] 337 NLRB 1279 (2002) (employer had an established past practice of allocating health insurance premiums according to specific percentages and the Board held that this allocation was part of the employer's established past practice; therefore, the employer did not violate Section 8(a)(5) or (1) when it unilaterally implemented an increase in the amount deducted from the employees' paychecks for health insurance coverage).

[29] Id. at 1280 (where an employer's action does not change existing conditions, that is, where it does not alter the status quo, the employer does not violate Section 8(a)(5) and (1)).

as provided in its contracts with SCIW. However, the evidence is unclear on what was the parties' past practice when no contract was in effect, that is during hiatus periods between contracts or in the initial allocation of a new contract. The Employer only provided evidence as to how the parties' contracts had allocated premium increases during the term of the contracts; the February 2004 change occurred during a contract hiatus period. Further, the February 2004 implementation was a break from the Employer's past practice because the proposal changed not only the premiums but also the structure of healthcare costs to employees by increasing yearly deductibles from $500 to $1,500. This significant increase in out-of-pocket cost to the employees thereby affected the employees in an entirely different manner than changes in previous years. Finally, the Employer's change to a self-insured plan impacted its prior past practice because the self-insured plan had an entirely different cost structure for the Employer. Specifically, under this plan the Employer is required to cover any shortage in monthly premium amounts to continue coverage for its employees and the Employer had to establish a reinsurance plan to cover its additional costs and catastrophic events.

In sum, we conclude that although the Employer was privileged to bargain separately over the health insurance issue because the plan's renewal date happened to occur during contract negotiations, the parties were not at impasse when the Employer broke off bargaining. Therefore, the Employer could not lawfully unilaterally implement its health insurance proposal. Accordingly, a Section 8(a)(1) and (5) complaint should issue, absent settlement.

B.J.K.